

BOARD OF PESTICIDES CONTROL

March 19, 2004

Board Rooms, Senator Inn & Spa
284 Western Avenue, Augusta

AGENDA/MINUTES

9:30 A.M.

The regular monthly meeting was called to order at 9:34 A.M. by Chair Carol Eckert. Other members in attendance included Berry, Bradstreet, Humphreys, Jemison, Simonds and Walton.

1. Introductions of Board and Staff

- ☒ The members and staff introduced themselves and Eckert welcomed Dan Simonds to his first meeting.

2. Minutes of the January 23, 2004 Board Meeting

Action Needed: Amend and/or Approve.

- ☒ Batteese informed the members that the reference to 24 drift cards on the third line of page three was not correct and that the sentence would read fine by simply deleting the number 24.

Berry/Walton: Motion made and seconded to approve the minutes as amended.

In Favor: Unanimous

3. Request from Maine Migrant Health Program for Grant to Help Support a Worker Protection Safety Trainer for Summer 2004.

Since 1995, the Board has supported a Migrant and Seasonal Farmworker Program conducted by the Training and Development Corporation (TDC) of Bucksport. At the January meeting, the Board learned the TDC will be unable to provide the pesticide safety training this summer because the AmeriCorps members it has utilized in the past will not be funded at the national level in 2004. The Maine Migrant Labor Program has worked closely with the TDC trainers in past years and is willing to provide funding for the supervision, housing, travel and supplies for one bilingual trainer if the Board provides funding for the salary and fringe benefits for a ten-week period. Since these costs will only be slightly higher than that expended in past years, the staff is recommending the Board support the grant request so pesticide safety training will again be available to farmworkers this summer.

Presentation By: Barbara Ginley
Executive Director

Action Needed: Discussion and determination if the members wish to have staff fund this grant request.

- ☒ Ginley explained that her organization had worked closely with the Americorps members from TDC the past few years and wished to see pesticide safety training still made available to blueberry and brocolli workers and their families. Eckert asked Fish if a bilingual person was still needed and he replied that an interpreter was still crucial to answer any questions workers had after viewing the video.

Humphreys/Berry: Motion made and seconded to have staff fund the grant request.

In Favor: Unanimous

4. Section 18 Emergency Registration Renewal Request for Coumaphos to Control Varroa Mites and Small Hive Beetles in Managed Honey Bee Colonies

The Division of Plant Industry in the Maine Department of Agriculture, Food & Rural Resources has again requested that the Board petition EPA for a FIFRA Section 18 specific exemption for use of coumaphos (CheckMite+) to control both Varroa Mites and Small Hive Beetles in managed bee colonies. Fluvalinate has been used to control Varroa Mites since 1987 but resistance started developing in 1997. In addition, Small Hive Beetles have spread into Maine and there is no product currently registered to control this pest. The State Apiarist points out that a healthy bee keeping industry is needed to support Maine agriculture, and that a regulatory control product is essential so that migratory bee operators may continue to service the various commodity groups in this state. The request is supported by the product manufacturer, Bayer Corporation, and their registration specialist points out a full Section 3 Registration request was submitted to EPA on October 31, 2002.

Presentation By: Wesley C. Smith
Pesticides Registrar

Action Needed: Approve/Deny request to petition EPA for a Section 18 Specific Exemption registration for coumaphos for use with bees.

- ☒ Smith reminded the members that this request had been made annually since 1999 and that this product controlled both Varroa Mites and Small Hive Beetles. He advised that Tony Jadcak was present to answer questions specific to the bee industry. Eckert recognized Jadcak who summarized the situation noting that bees were vital to pollination, the numbers of bees globally were still down by 50%, and control was necessary to maintain interstate movement.

Bradstreet/Jemison: Motion made and seconded to petition EPA for a Section 18 Specific Exemption Registration for coumaphos for use with bees.

In Favor: Unanimous

5. Section 18 Emergency Registration Renewal Request for Thymol to Control Varroa Mites in Managed Honey Bee Colonies

The Division of Plant Industry in the Maine Department of Agriculture, Food & Rural Resources is also requesting that the Board petition EPA for a FIFRA Section 18 specific exemption for use of thymol (Api Life Var) to control Varroa Mites in managed bee colonies. EPA approved the initial request in 2003 after hive inspections conducted during the 2002 blueberry pollination season identified four migratory beekeeping operations with coumaphos resistant Varroa Mites. The State Apiarist is again seeking this product with its different mode of action to aid growers in controlling this pest in 2004. He again points out that a healthy bee keeping industry is needed to support Maine agriculture, and that a regulatory control product is essential so that migratory bee operators may continue to service the various commodity groups in this state.

Presentation By: Wesley C. Smith
Pesticides Registrar

Action Needed: Approve/Deny request to petition EPA for a Section 18 Specific Exemption registration for thymol for use with bees.

Jadczak explained thymol was a naturally occurring Italian product that could be used in rotation to help avoid the development of resistance. Jemison asked about other potential products and Jadczak replied that he would like to see oxalic acid registered but that no manufacturer seemed interested in supporting the product.

Jemison/Humphreys: Motion made and seconded to petition EPA for a Section 18 Specific Exemption registration for thymol for use with bees.

In Favor: Unanimous

Eckert expressed interest in having Jadczak make a presentation to the Board on beekeeping and the various pest control methods. Jadczak responded that he would be happy to do so after the summer season ends.

6. Report from Railroad Right-of-Way Subcommittee on Opposition to Proposed Monitoring Plan

On September 6, 2002, the Board voted to convene a stakeholders group to collect information on the potential for herbicides applied to railroad rights-of-way to drift or leach from the site. An employee of the Maine Department of Transportation (MDOT) volunteered to form and chair the group that included a broad section of state and federal agencies, public surface water suppliers, rail owners and herbicide application companies. On March 28, 2003, the Board voted that prior to issuing variances for the next year, the railroad applicators would have to submit no later than February 2004 an herbicide residue monitoring plan for drift and soil and water sampling protocols adjacent to and beyond the previously allowed ten foot buffer limits. At the January 23, 2004 meeting, the Board endorsed the recommendations of a subcommittee of the stakeholders group that called for the collection of 30 drift card samples and 15 water samples split equally over three rail lines and three days of application. In addition, the Portland Water

District had agreed to provide their results of water sampling of Sebago Lake adjacent to the Mountain Division rail line in Sebago Lake Village, and the Maine Drinking Water Program had agreed to sample public wells adjacent to tracks receiving herbicide applications. Since the January meeting, the railroad owners and MDOT have concluded that the request for monitoring would set precedent and questioned if it is legal for the Board to require them to provide sampling and testing to be granted variances. They have provided five legal cases regarding federal railroad statutes and are requesting that the Board ask the Attorney General for an opinion in this matter. The staff has forwarded this information to the Assistant Attorney General who represents the Board.

Presentation By: Robert W. Moosmann
MDOT Senior Landscape Architect

Action Needed: Discussion and/or Table the matter if the Assistant Attorney General has not had time to review the legal cases.

- ☒ Moosmann explained that the railroads use pesticides in a judicious manner and did not feel it was appropriate for the Board to either require a monitoring plan or ask the railroads to fund it as a prerequisite for a variance. He referenced the legal cases that had been submitted involving the Interstate Commerce Commission and the Surface Transportation Board, and indicated he thought the Board needed to demonstrate a problem exists before impeding the railroads in maintaining their tracks. Moosmann did indicate that the railroads were still willing to provide information about their spray plans and space on the spray vehicle so Board staff could conduct monitoring of this year's applications.

Eckert expressed disappointment with these developments and Humphreys found it provoking that the railroads waited until this late date to decide they would not cooperate on the monitoring plan. Walton recalled that when he was at MDOT they had a 50 foot buffer on state tracks and asked when the switch was made to 10 feet. Brian Chateauvert of RWC, Inc. stated that prior to the meeting of railroad officials with the Board in 1999 he treated all the regular lines right up to the water's edge. Wayne Duffett of TEC Associates reported on his work for the St. Lawrence & Atlantic Railroad and suggested any distance greater than 10 feet would be unreasonable and that 50 feet would take about a third of the area out of the spray zone. Moosmann indicated he felt that the MDOT buffer of 50 feet was somewhat arbitrary, and since the drops produced by the railroad equipment were larger than those produced by highway sprayers, a lesser buffer was appropriate.

Randlett called the member's attention to his memo of March 16, 2004 and pointed out that it was not a formal opinion of the Attorney General. He reviewed the Board's authority to grant variances if it finds that the applicant will achieve a substantially equivalent degree of protection as adherence to the requirements of the rule would provide, and that the spray activities would be conducted in a manner that protects human health and the environment. He further advised the Board that it would need to determine these factors in light of the standard for which the variance was sought. He cautioned that Chapter 22 containing the variance provisions is designed to minimize pesticide drift and that any conditions requiring monitoring should be limited to targeting of drift exposure. He also stated that his review of case law indicated that the Board's authority

to condition variances was not preempted by the ICCTA under the circumstances presented.

Jemison indicated he was more concerned about the potential for the herbicides to leach. Randlett advised the Board might want to address this issue by amending Chapter 29 to include buffers from surface waters. Walton asked if the railroads ever used back pack sprayers close to water. Chateauvert replied they did not because there was too much distance to cover and get it done between train runs.

David Fink of the Guilford Rail System stated that he was concerned about the Board setting a precedent by requiring the railroads to fund a monitoring project. He also explained that three quarters of his vegetation management budget is spent weed whacking the brush with two large cutting machines and that the spraying is a small part of the total effort.

Moosmann recommended that the Board submit applications for research grants to fund monitoring of drift and leaching in 2005. Jennings observed that the Board had gone down the wrong road with respect to the variance and pointed out that RWC, Inc. uses the best available technology to reduce drift. He suggested that the Board staff could continue to do some limited monitoring in 2004 if it had information on the schedule of applications and the materials to be applied.

7. RWC, Inc. Request for Variance for Railroad Vegetation Management Program

The Board's drift regulations allow applicators to seek a variance from any standards they feel are unreasonable for their type of operation. This spray contracting firm is preparing to conduct railroad vegetation control activities on all the major rail lines in Maine including those owned by the State. The firm is seeking a variance so they do not have to record all sensitive areas within 500 feet of the tracks. Instead, they propose taking other precautions that include having a spotter running ahead of the spray rig, employing drift control agents and maintaining a ten foot buffer from all open water. In addition, they have proposed in a separate letter to only use Roundup when operating within one half mile of public water supplies and limiting the spray swath out from the rails a minimum distance to allow proper inspection of the tracks. Furthermore, the MDOT has submitted a March 9, 2004 letter pointing out it will limit its herbicides to glyphosate, imazapry and fossamine ammonium; and requesting to be excused from providing monitoring and to be allowed to continue with a 10 foot buffer from water. The staff will point out that the RWC, Inc. request does not include any provisions for environmental monitoring as the Board had previously requested. If the Board decides to approve the request based upon discussion of the previous agenda item, the staff will recommend that the permit be conditioned both on only using Roundup within one half mile of public water supplies and the longstanding provision that the company provide public notification through newspaper advertisements and letters to affected municipalities.

Presentation By: Robert I. Batteese, Jr.
Director

Action Needed: Approve/Deny the variance request.

- ☑ Bradstreet/Berry: Motion made and seconded to approve the variance.
- ☑ Humphreys/Jemison: Motion made and seconded to condition the variance to require the applicator to (1) publish notice of intended applications in newspapers and send letters to affected municipalities; (2) provide notice to Board's staff specifying the herbicide mixes to be applied on each rail line and the areas different mixes will be used; (3) call at the conclusion of spraying to advise the staff the area to be treated the following day; and (4) apply only Roundup for a distance of one half mile before and beyond the site of a public water supply, and within that area, to limit treatment to the ballast area of the roadbed extending laterally no further out beyond the rails than is necessary to allow proper inspection.

In Favor of the amended motion: Berry, Bradstreet, Jemison and Simonds

Opposed: Eckert, Humphreys and Walton

Randlett advised that this lengthy discussion indicated the Board should revisit the issues of variances in Chapter 22 and buffers in Chapter 29 at the annual planning session. There was consensus that these topics should be on the agenda for the planning session.

8. Consideration of Staff Negotiated Consent Agreement with Vegetation Management of Houlton

On June 3, 1998, the Board amended its Enforcement Protocol to authorize staff to work with the Attorney General and negotiate consent agreements in advance in matters not involving substantial threats to the environment or public health. This procedure was designed for cases where there is no dispute of material facts or law, and the violator admits to the violation and acknowledges a willingness to pay a fine and resolve the matter. This case involves the commercial application of an herbicide to a transmission power line in Dyer Brook that resulted in damage to an adjacent potato field. The application violated both the label provisions of the Garlon 4 pesticide label to not permit the product to come into direct contact with desirable broadleaf plants and the Board's Chapter 22 regulation requiring applicators to protect sensitive areas and minimize drift to the maximum extent practicable.

Presentation By: Henry S. Jennings
Chief of Compliance

Action Needed: Approve/disapprove the consent agreement negotiated by staff.

- ☑ Jennings reported that the herbicide did not cause any symptoms to appear on the potato plants and that the damage was not evident until harvesting produced only a few small tubers with discoloration. He indicated the delay in settlement of this case occurred due to the death of one of the partners in the spray firm.

Bradstreet/Humphreys: Motion made and seconded to approve the consent agreement negotiated by the staff.

In Favor: Unanimous

9. Development of Regulation to Establish Standards for Indoor Applications

At its March 11, 2003 planning session, the Board determined that the top priority for any discretionary tasks should be to revisit the subject of developing standards for indoor pesticide applications. This topic has been discussed on several occasions since 1987 and was last addressed by a stakeholder group in 1998 and 1999. A wide range of recommendations have been generated over the years but more pressing needs for rule-making have prevented the Board from taking any action. The staff will review the various proposals to date and inquire how the members would like to proceed with this issue.

Presentation By: Robert I. Batteese, Jr.
Director

Action Needed: Discussion and determination if the Board wants staff to develop a new draft regulation following the model of Chapter 27 or if it wishes to engage in consensus-based rule development.

- ☒ Batteese called the members attention to the packet but announced the staff did not find that material particularly helpful because it had followed the pattern of Chapter 22. He reported the staff had been developing a new draft rule based on the model of Chapter 27 and should be able to have a draft ready for review at the next meeting. Eckert recalled previous efforts trying to develop a draft rule and indicated that there had been criticism that the last stakeholder group had not been fully representative. Jennings suggested the Board should focus on where people spend long periods of time such as residences and workplaces rather than on short term visits to stores, restaurants, hotels, etc.

Bradstreet/Simonds: Motion made and seconded to request staff to continue developing a draft rule modeled after Chapter 27.

In Favor: Unanimous

10. Demonstration of Newly Redesigned Board Web Site

The Board's staff has been working since last fall to improve the accessibility and usability of its current web site. The new site was created using the latest Dreamweaver MX 2004 web developer software by Macromedia. While the new site is still a work in progress, it has improved accessibility and navigation. The staff will continue to improve the site by adding more graphics, re-evaluating current content, including more information that the public at large would find useful and offering e-services. The new site has been live since the beginning of March.

Presentation By: Kelly J. Bourdeau
Public Information Officer

Action Needed: None, informational only.

- ☒ Bourdeau demonstrated the primary features of the web site. She urged the members to check it out further in their spare time and contact her with any questions or suggestions.

11. Other Old or New Business

a. Update on Pesticide Container Recycling - R. Batteese

- ☒ Batteese informed the members that staff were still pursuing all options to get the containers returned and recycled and would continue to update them at future meetings. Bradstreet announced that he would be discussing the matter further with the Maine Potato Board and that they were especially interested in involving Norman Cyr at the Northern Aroostook Regional Waste Facility in Frenchville.

b. Consensus-Based Rule Development Process
Halted at the Request of the Petitioner - G. Fish & K. Bourdeau

- ☒ Fish reported that he and Bourdeau felt the first meeting had been quite productive but that Mary Ellen Valentine had asked that the process be suspended because she was uncomfortable knowing the group would be discussing her medical condition at their next meeting. Eckert asked what would happen next and Fish informed her Randlett had spoken with Valentine's lawyer. He had invited her to explain how the Board could conduct a public proceeding to be based on protecting her health without discussing the reasons she was seeking the critical pesticide control area designation.

c. Letters Sent to Internet Dealers - R. Batteese

- ☒ Batteese stated this was an informational item so the members would know the staff had identified nearly 60 internet pesticide dealers and sent them letters advising about the aquatic herbicide rule.

d. Variance Granted to City of Bangor - R. Batteese

- ☒ Batteese indicated this was another informational item to show the staff had renewed this variance permit.

e. Update on Medical Advisory Committee's
Review of Trichlorfon - L. Hicks and C. Eckert

- ☒ Eckert explained that the MAC members still had mutagenicity and carcinogenicity concerns and were not willing to recommend a reclassification to general use. She indicated that some of the members could accept a restricted use classification. In response to a question, Fish indicated there are always questions at the turf meetings about when the products might be available. Humphreys observed that grubs in lawns are not life threatening.

Jemison/Humphreys: Motion made and seconded to take no action on the classification of trichlorfon products.

In Favor: Unanimous

- a. Central Maine Power Company's
Vegetative Management Plan for 2004 - R. Batteese

☒ Batteese reminded the members that CMP does not request variances because all their applications are made with nonpowered equipment. David Whitworth was present and announced that their new parent company decided to have all their pesticide work performed by one company. He indicated Lucas Tree Experts had been chosen for 2004.

- f. Drift Management Plan for Deblois
Critical Pesticide Control Area - R. Batteese

☒ Batteese reminded the members they had requested this document and advised that it appeared to address all the issues. There was consensus among the members that they were satisfied with the plan.

- h. Correspondence from Beedy Parker
regarding pressure treated wood - R. Batteese

☒ Batteese noted Parker had not requested any specific action and pointed out EPA had already received voluntary cancellations of CCA products so they would no longer be used to pressure treat wood for residential use.

- i. Other ???

☒ Hicks presented a West Nile Virus update informing the members that the Department of Human Services was presenting two programs for municipal officials on April 27 and 29th.

☒ Batteese also noted the staff had included copies of the new aquatic herbicide list and letter supporting Dr. Stones grant request for informational purposes only.

12. Schedule and Location of Future Meetings

- a. The Board has tentatively scheduled the next meeting for Friday, April 23rd.

☒ The Board scheduled their next meeting for Friday, April 23rd in the Waterville area.

- b. Location and dates for future meetings?

☒ The Board scheduled the annual planning session for Friday, May 14th

☒ The Board tentatively scheduled the following meeting for Friday June 4th.

☒ The Board tentatively agreed to hold the dates of July 21, 22 and 23 open for a Board meeting in Presque Isle and participation in the Maine Potato Board's tour

of Aroostook County.

13. Adjourn

☒ A motion to adjourn was accepted at 1:25 P.M.

Robert I. Batteese, Jr.
Director